No. 16,249

IN THE

United States Court of Appeals

For the Ninth Circuit

EARLE L. REYNOLDS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Criminal No. 11,258.

APPELLEE'S ANSWERING BRIEF.

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FILED
MAR 25 1959
PAUL P. O'BRIEN, CLERK

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JURISDICTIONAL STATEMENT.

Appellee agrees with the jurisdictional statement set forth at page 1 of appellant's brief.

STATEMENT OF THE CASE.

So much of the statement of the case contained in appellant's brief is taken from outside the record or from a statement which the appellant made to the Court at the time of sentencing that it is deemed appropriate that appellee make its own statement of the

case, based upon the evidence and those portions of the record which this Court may properly consider.

On May 8, 1958, the appellant, a citizen of the United States (R. 188, 236), was given a copy of a Notice to Mariners published by the United States Navy Hydrographic Office, containing the Regulation issued by the Atomic Energy Commission on April 11, 1958 (hereinafter called the Regulation), (R. 194-8). This Regulation barred all United States citizens from a defined danger area in the Eniwetok atomic proving grounds during a certain period and except under certain circumstances not here pertinent. Subsequent thereto the appellant, his wife and two children and an additional crewman, set sail from Honolulu on his yacht "Phoenix" and on June 30 approached the said danger area. Pursuant to orders, the Coast Guard cutter "Planetree" on this date intercepted the yacht "Phoenix" to advise her of her position, of the contents of the AEC regulation, and to ascertain the intention of the master as to whether or not he intended to enter the nuclear testing area, the so-called danger zone (R. 207-8).

The master of the "Phoenix", appellant herein, informed the master of the Coast Guard vessel that he intended to enter the danger area (R. 209). When the "Phoenix" was about seven miles outside the danger area she was again advised by the Coast Guard officer of her position, and again warned of the penalties involved and the fact that the master would be subject to arrest if he entered the danger area (R. 210-11). The appellant stated that he understood but proceeded

nevertheless to a point sixty-five miles inside the danger area, on the high seas, where on July 2, 1958, he was placed under arrest for violating the Regulation (R. 211, 233). After removing the yacht and those aboard from the danger area, the Coast Guard arresting officer brought the appellant to Honolulu, District of Hawaii, on July 8, 1958, from Kwajalein.

Appellant was taken before the Commissioner and committed on July 8, 1958, pending action of the grand jury. The appellant appeared with counsel before the trial court on July 21, 1958, waived indictment and obtained a continuance for plea to the Information (R. 2-5). On July 28, 1958, appellant's counsel filed a motion to dismiss, noticed for hearing on August 6, 1958 (R. 21, 308), and appellant received permission to travel to the mainland United States to obtain additional legal assistance and funds (R. 43-48).

The motion to dismiss was heard and denied on August 6, 1958, and the matter of setting trial was continued to August 11, 1958 (R. 51-94).

On August 11, 1958, trial was set for August 25, 1958, the Court having refused appellant's request to set trial for September 24, 1958, a date unavailable on the Court's calendar (R. 102-129, 313).

On August 18, 1958, appellant filed a motion to postpone the trial together with an affidavit by appellant's Washington counsel, Mr. Rauh. Mr. Rauh's affidavit requested the postponement on the ground that the trial, as then set, would interfere with Mr. Rauh's vacation plans and other commitments (R. 130-135).

On August 20, 1958, the motion to postpone the trial was heard and denied on the grounds that the alleged inability of Mr. Rauh to appear as scheduled was non-existent (R. 140-154), and that the Court itself had commitments that prevented its acceding to Mr. Rauh's request (R. 313).

The following day appellant filed a "Notice of Discharge" of counsel and Mr. Miho attempted to withdraw. Appellant interceded for Mr. Miho in the latter's request for leave to withdraw and expressed a willingness to defend himself (R. 157-172). The Court found the withdrawal on the eve of trial to be unjustified and found that appellant was satisfied with and needed Mr. Miho's services. Leave to withdraw was accordingly denied and appellant was denied leave to defend in *propria persona* (R. 167-172).

On August 25 and 26, 1958, appellant, represented by his counsel, was tried before a jury and convicted. Mr. Rauh chose not to appear at the trial (R. 176-303). This appeal followed.

ARGUMENT.

I.

THE COMMISSION REGULATION OF APRIL 11, 1958, WAS VALIDLY ISSUED PURSUANT TO AUTHORITY GRANTED BY CONGRESS IN THE ATOMIC ENERGY ACT OF 1954.

A. The regulation was promulgated pursuant to the authority granted by Section 161 (i) of the Act (42 U.S.C. 2201 (i)) generally and was not limited to the authority found in Subclause (3) thereof.

Under Section 91 (a)(1) of the Atomic Energy Act of 1954 the Atomic Energy Commission is authorized to "conduct experiments and do research and development work in the military application of atomic energy" (42 U.S.C. 2121 (a)(1)). The Act defines the phrase "research and development" to mean *(id.* at 2014 (v)):

> * * * (1) theoretical analysis, exploration, or experimentation; or (2) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental demonstration purposes, including the experimental production and testing of models, devices, equipment, material, and processes.

Palpably then, the Act, as literally read, is broad enough in scope to embrace the type of nuclear test activities engaged in by the United States at Eniwetok and Bikini Atolls for the past twelve years, including the HARDTACK series conducted in 1958. The Commission is not only vested with *authority* to carry on such activities, but it is affirmatively charged with responsibilities relating, *inter alia,* to the defense

of the United States, the safeguarding of Restricted Data and the protection of the health and safety of the public. See, *e.g.,* 42 U.S.C. §§ 2011-2013, 2037, 2121, 2153, 2161-2165.

On September 15, 1957 the Atomic Energy Commission announced a series of nuclear tests to begin in April, 1958 at the Eniwetok Proving Grounds in the Pacific. These tests were officially designated as the HARDTACK test series. On February 14, 1958, the Commission issued public notice of the danger area to be established April 5, 1958 in connection with the forthcoming HARDTACK series. By regulation (23 Fed. Reg. 2401; Br. App. A, pp. 78-80) dated April 11, 1958, the Commission issued the following prohibition:

> [t]o avoid any unnecessary delay or interruption of that test activity, and to protect the health and safety of the public, * * *.
>
> * * * * * *
>
> § 112.4 *Prohibition.* No United States citizen or other person who is within the scope of this part shall enter, attempt to enter or conspire to enter the danger area during the continuation of the HARDTACK test series, except with the express approval of appropriate officials of the Atomic Energy Commission or the Department of Defense.

The authority under which the Commission acted in promulgating Section 112.4, *supra,* of the Regulation, is specifically enumerated therein (23 Fed. Reg. 2401; Br. App. A, p. 79) to be Section 161 (i) (42 U.S.C. 2201 (i)) of the Atomic Energy Act of 1954. Section

161 (i) authorizes the Commission in the performance of its functions to:

> Prescribe such regulations or orders as it may deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this chapter, (2) to guard against the loss or diversion of any special nuclear material acquired by any person pursuant to section 2073 of this title or produced by any person in connection with any activity authorized pursuant to this chapter, and to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security, and (3) to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property.

Appellant contends (Br. 15-24) that Congress did not authorize the Commission to issue the April 11, 1958 Regulation. As the initial premise to his argument, he assumes that the Commission acted under the purported authority granted by subclause (3) of Section 161(i), since allegedly, the latter "made no claim" that the regulation "was for any of the purposes specified in subclauses (1) and (2)" thereof[1]

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[1]Appellant contends that Government counsel in the Court below conceded that authority for the regulation of April 11, 1958 was based solely upon subclause (3) of Section 161(i). However, since counsel for appellant had contended that the regulation was poised solely on the subsection of the statute designed to protect Restricted Data, Government counsel merely sought to

(Br. 16). Appellant's assumption, however, we submit, plainly does not withstand analysis.

In promulgating the regulation, the Atomic Energy Commission set forth the authority of Section 161(i) generally and did not limit it to any particular subclause thereof. The facts surrounding the issuance of the regulation and the preamble to the regulation itself, moreover, make it abundantly clear that the regulation was issued to effectuate ends specified in each of the three subclauses of the Section.

Entrusted to the Commission by Congress is the responsibility of controlling the dissemination of Restricted Data. It is quite obvious that entry into the HARDTACK Danger Area by unauthorized persons—for example, those without a Q-clearance—could result in a compromise of Restricted Data. The very nature of the tests conducted at the Eniwetok Testing Ground compel this conclusion. By the same token, located at the Testing Ground were test devices which contained special nuclear material which could be both lost and diverted to the detriment of our common defense and security by the entry of unauthorized persons therein. Pursuant to the authority vested in the Commission under the first two sub-clauses of 161 (i) (42 U.S.C. 2201 (i), (1), (2), see *supra,* p. 7), to protect Restricted Data and to guard against loss or

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place the regulation within the purview of subclause (3) as well as subclause (1) (R. 386-387). In any event, the point in issue now is whether or not the Atomic Energy Commission had authority to and did in fact issue the regulation under Section 161(i) generally.

misuse of special nuclear material in addition to its responsibility under subclause (3) to protect the health and safety of the public (*ibid.*) the regulation of April 11, 1958 was promulgated. Since the Commission is charged with these responsibilities, it was not only proper but necessary to issue the regulation in order to competently fulfill the duties entrusted to it.

That the Commission intended to rely upon Section 161 (i) (42 U.S.C. 2201 (i)) generally, rather than merely upon subclause (3) thereof is also clear from the preamble to the regulation itself (see 23 Fed. Reg. 2401; Br. App. A, pp. 78-79). As stated therein, the purpose of the regulation was "to avoid any unnecessary delay or interruption of the test activity *and* to protect the health and safety of the public." It is apparent, therefore, that one of the Commission's purposes in promulgating the regulation was to avoid any interruption of the test activity, whether caused by danger to life or property or by the possibility of compromising Restricted Data due to the presence of unauthorized individuals. The preamble further states, moreover, that "[t]he efficient and early completion of this test series * * * is of major importance to the *defense* of the United States and of the free world" (*ibid.*, emphasis added). Since no flavor of national defense can be gleaned from subclause (3), which relates merely to the protection of the health and safety of the public, it is obvious that authority for the regulation was not based solely upon that subclause.

However, even if subclause (3) was the sole basis for the Commission's exercise of authority, we think it quite clear that the regulation was validly promulgated thereunder. Subclause (3) authorizes (42 U.S.C. 2201 (i) (3)) regulations:

> to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property.

It is apparent that the end to be effectuated by this provision was the issuance of regulations to protect health and to minimize danger to life or property, which from the very nature of the statutorily authorized activities, would necessarily result if minimum safety standards and rules and regulations respecting the operation of the activities were not set up. Such danger to life and property might result from the construction, design or location of facilities, the use of faulty and substandard equipment and the failure to employ trained and qualified personnel or to take the proper steps to insure, to the greatest degree possible, their safety while performing their various functions and duties, as well as by allowing untrammeled locomotion or navigation through areas contaminated by exposure to lethal degrees of radiation. Clearly, the authorization to issue regulations under subclause (3) was undoubtedly intended by Congress to give the Commission power to adequately deal with all of these dangers, including the latter. It is un-

disputed here that the undetected entry into the Eniwetok testing area would have constituted a serious hazard to the persons and property of the entrants. The Commission's April 11, 1958 Regulation was designed to avoid this danger and, as we have shown, was clearly authorized by subclause (3) of Section 161 (i). Some may insist, as has been done in the past, that the safety of those desiring to enter this danger area is a matter for their sole concern. We submit, however, that elementary considerations, including the duty of every nation to conduct its affairs with due regard to the safety of human life and property as well as the Commission's statutory responsibilities in this regard did not permit the Commission to remain aloof.

B. Section 161(i) authorizes the Commission to issue regulations for the purposes specified therein, in connection with the conduct of nuclear weapons tests such as the HARDTACK series and applicable to persons who, like appellant, are "strangers" to the atomic energy program.

Appellant contends (Br. 17-24) that the April 11, 1958 Regulation was issued by the Commission without statutory authority, since subclause (3) of Section 161 (i), which allegedly constituted the sole basis of the latter's action (Br. 16), was purportedly not intended by Congress to permit the Commission to regulate the activities of persons who, like himself, are "strangers" to the atomic energy program, nor in connection with activities such as the Commission's own weapon testing. His argument is founded on an interpretation of what he calls the "key words" (Br.

18) of subclause (3). We submit that the argument lacks merit.

(1) Appellant first contends (Br. 18-21) that the phrase "activity authorized pursuant to this Act," which limits the scope of the regulations authorized under all three subclauses of 161 (i), does not include activities assigned to the Commission, such as atomic weapon testing, but instead, pertains only to activities authorized by the Act to be performed by others under Commission authorization and regulation. Appellant points out that subclauses (1) and (2) permit regulations specifically affecting *persons* engaged in activities authorized under the Act. (See 42 U.S.C. 2201(i) (1) and (2)) and that the Commission is expressly excluded from the definition of "person" contained in Section 11(q) (42 U.S.C. 2014(q)) thereof. He thus concludes that the scope of the activities to which subclauses (1) and (2) pertain does not include those which the Act authorizes the Commission itself to perform and that the activity referred to in subclause (3) is also so limited since "there is nothing to suggest that such activity is different in type from that referred to in subclauses (1) and (2)" (Br. 21).

At the outset, it should be noted that there is nothing in the language of subclause (3) which suggests that the regulations authorized thereunder are limited to those which affect *persons* engaged in activities authorized by the Act. Subclause (1) permits regulations "to protect Restricted Data received by any *person* in connection with any activity authorized pur-

suant to this Act" (42 U.S.C. 2201(i) (1); emphasis added). Subclause (2) authorizes the Commission "to guard against the loss or diversion of any special nuclear material acquired by any *person* pursuant to section 2073 or produced by any *person* in connection with any activity authorized pursuant to this Act" (42 U.S.C. 2201(i) (2); emphasis added). Subclause (3), however, permits the issuance of regulations "to govern any activity authorized pursuant to this Act" (42 U.S.C. 2201 (i) (3)) and makes no reference to "persons." There is, therefore, manifestly no basis, we submit, for the conclusion that the scope of the authority granted under subclause (3) is curtailed by any limitation placed upon it by the Act's definition of the term "person."

Assuming *arguendo,* however, that the Commission's authority under subclauses (1) and (2) must be read in the light of the limitations, if any, inherent in the Act's definition of "person" and that such limitations affect, as well, the scope of the authority which may be exercised under subclause (3), it does not follow, as appellant suggests, that Section 161(i) does not authorize the issuance of regulations for the purposes specified in that section, in connection with activities, such as nuclear weapons testing, which the Act authorizes the Commission itself to perform. Though, it is true that Section 11(q) (42 U.S.C. 2014(q)) expressly excludes the Commission from the definition of the term "person," appellant overlooks the fact that the Commission's agents and employees are included within the definition of that term. This

conclusion must necessarily follow, we think, from the fact that under the Act "person" means, *inter alia,* "any individual" *(ibid.).* It cannot be seriously disputed that the Commission's agents and employees are "individuals" within the meaning of the Act, especially since the term is preceded in the statute by no more a qualifying adjective than "any." Thus, even if the regulations which are authorized under subclauses (1) and (2) and consequently (as appellant contends) under subclause (3) are limited to those affecting "persons" engaged in activities authorized by the Act, then, under appellant's own reasoning, all three subclauses would include activities which the Act authorizes the Commission itself to perform since, as we have shown, the language used (i.e.—"person[s]") would not exclude the latter's agents and employees.

Finally, we think that the plain language of Section 161(i) serves to refute appellant's contention. All three subclauses thereof permit the issuance of regulations for the purpose specified in each subclause "in connection with" or "to govern" "*any* activity authorized pursuant to this Act" (42 U.S.C. 2201 (i); emphasis added). It is obvious from such language that the intent of Congress was to cover *all* the activity authorized by the Act and not to refer only to *some* of such activities. For, if the latter was intended, no sound reason has been advanced by appellant why Congress would not have made clear the included or excluded activities by enumerating them in the statute. The statutory language used in this respect being

clear, there is, we submit, no necessity to go beyond the plain meaning of that language in construing the statute.[2] *United States v. Hood,* 343 U.S. 148; *United States v. American Trucking Ass'n.,* 310 U.S. 148; *Chung Fook v. White,* 264 U.S. 443; *Lake County v. Rollins,* 130 U.S. 662.

(2) Appellant next contends (Br. 21-23) that the term "facilities" as used in subclause (3), "reinforces the conclusion" that Section 161(i) "relates to activities authorized under the Act to be performed by licensees, contractors and other persons" (Br. 21). His argument, however, rests upon two assumptions, both of which, we think, are unfounded. Appellant first assumes that the only activities which may be regulated under subclause (3) are those which are similar to the type specified in the phrase "including

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[2]Nor, if it were necessary to go beyond the "plain meaning" of the statutory language, would the legislative history of Section 161(i) support the interpretation of that section urged by appellant. Two of the three references to the legislative history cited by appellant (Br. 26-27, n. 9) plainly do not shed light on the intended meaning of the language "any activity authorized pursuant to this Act" since they are couched in substantially the same language as the statute itself. See Hearings before Joint Committee on Atomic Energy on S. 3323 and H.R. 8862, 83rd Cong., 2d Sess., p. 601; S. Rept. No. 1699, 83rd Cong., 2d Sess., p. 26. If these references have any value in explaining the meaning of Section 161(i) they would, we submit, support a broad rather than a limited construction of that Section. The third reference cited by appellant—*i.e.* the remark of Mr. William A. Steiger of the National Association of Manufacturers that "[t]his Chapter authorizes the Commission to do a number of things including the establishment of standards of safety for licensees." Hearings, *supra,* at p. 465, is, insofar as it tends to support appellant's construction of Section 161(i), explained in view of Mr. Steiger's limited purpose in appearing before the Joint Committee. *Id.* at 461.

standards and restrictions governing the design, location and operation of facilities used in the conduct of such activity" (see subclause (3), 42 U.S.C. 2201 (i) (3)). We submit, however, that the doctrine of *ejusdem generis,* urged by appellant in support of this assumption, is inapplicable. The doctrine of *ejusdem generis* applies only to statutes which enumerate specific terms followed by one or more general terms. *United States v. Alpers,* 338 U.S. 680, 682-683; *Gooch v. United States,* 297 U.S. 124, 128. Since Section 161(i) (3) is not such a statute, the rule is clearly inapposite. Thus, the "including" phrase in the subclause does not control the types of activities which may be regulated thereunder but merely makes clear that these activities include the design, location and operation of facilities.

Secondly, appellant urges that the "including" phrase refers only to activities other than weapon testing because the use of the term "facilities" therein allegedly precludes reference to the latter activity. This conclusion rests upon the assumption that the only "facilities" comprehended by the Act are "production and utilization facilities" both of which, by definition, do not relate to atomic weapons or weapons test devices (see 42 U.S.C. 2014(t), (aa), (d)). Though we think that our immediately preceding argument, if correct, would preclude the necessity of refuting this aspect of appellant's argument, we attempt to do so, in the event that the Court does not agree with our interpretation of subclause (3) advanced therein.

Concededly, the Act defines only two types of "facilities." It is true also, that the definition of a "production facility" in Section 11(t) (42 U.S.C. 2201(t)) and the definition of a "utilization facility" in Section 11(aa) (42 U.S.C. 2201(aa)) do not relate to atomic weapons or weapons test devices (see also 42 U.S.C. 2201(d)). It does not follow, however, that the fact that these two types of facilities are specifically defined in the Act means that no other types of facilities are comprehended therein or that only the former are referred to by the use of the term "facilities" in subclause (3). On the contrary, an examination of the Act compels the conclusion that other types of facilities are sometimes referred to. Though many sections specifically refer to production or utilization facilities as such (see 42 U.S.C. 2012(e), (f), 2019, 2020, 2051 (a) (4), 2061, 2063, 2064, 2073, 2121, 2131-2134, 2136, 2137, 2139, 2140, 2232, 2235, 2238), only a few, when they are referring only to these types of facilities, fail to specifically label the type of facility referred to (see, *e.g.,* 42 U.S.C. 2233, 2236). On the other hand, some sections do not specifically refer to production or utilization facilities and were apparently intended to apply to other types of facilities as well as those for production and utilization of special nuclear material (see 42 U.S.C. 2017, 2017b, 2052, 2053, 2201(e), (i), (k), (m), 2271, 2278a). Thus, for example, Section 161(e) makes reference to "facilities * * * for the housing, health, safety, welfare, and recreation of personnel employed by the Commission" (42 U.S.C. 2201(e)) which obviously does not refer to produc-

tion or utilization facilities. It is clear from this, we think, that "facilities" as used in subclause (3) does not necessarily refer only to those for production or utilization. And, there is no sound reason why that term as it appears in this subclause of Section 161(i) should be afforded the limited construction contended for by appellant.

Nor is it significant that "production facility" and "utilization facility" are the only types of facilities specifically defined in the Act (42 U.S.C. 2201(t) and (aa)). These terms are, by those very definitions, given a special and limited meaning in the Act and, as an examination of the Act will demonstrate, are usually specifically referred to as such when the intent is to refer to them only. There being no evidence that the term "facilities" as used in Section 161(i)(3), without a qualifying adjective, was intended to have a special meaning, it must be given its ordinary meaning and, its dictionary definition may be used as an aid to construction. See, *e.g., Nix v. Heddon,* 149 U.S. 304, 306. Webster's New Collegiate Dictionary defines the term to mean, *inter alia,* "a thing that promotes the ease of any action, operation or course of conduct" (2d ed. 1953, p. 296). It is readily apparent that atomic weapons, and weapons test devices, as well as nuclear weapons tests installations are included within this definition. Thus, even if the activities which the Commission is authorized to regulate under subclause (3) are limited to those of the same type to which the "including" phrase relates, the Commission is clearly authorized, under the subclause to issue regulations in connection with nuclear weapons tests.

(3) Appellant next contends (Br. 23) that, whatever the meaning of the term "facilities" in subclause (3), the contested regulation was not authorized thereunder, since, allegedly, it did not govern the "design, location and operation" of any facility and this is all that the subclause permits to be regulated with respect to "facilities." As we have previously noted (*supra,* pp. 15-18), however, the subclause permits regulations "to govern *any* activity authorized pursuant to this Act" and there is manifestly no basis for the conclusion that the scope of the regulations authorized by that phrase is limited by the "including" phrase which follows it. In addition, we think, that the prohibition against entry into the test area by persons under the jurisdiction of the United States, pursuant to the regulation, *was* authorized as a "restriction" "governing the * * * operation of" a "facility" (nuclear weapon test area) "used in the conduct of such activity" (nuclear weapons tests). See 42 U.S.C. 2201 (i) (3).

(4) Moreover, Section 161(i), contrary to appellants' contention, *does* authorize the issuance of regulations applicable to persons who, like himself, are "strangers" to the atomic energy program. Subclause (1) permits regulations "to protect Restricted Data received by *any* person." Subclause (2) authorizes the Commission "to guard against the loss or diversion of special nuclear material * * * and to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security." But the diversion of special nuclear material may result from its being stolen by "strang-

ers'' to the atomic energy program. If the Commission is to effectively guard against such diversion, it necessarily must have the power to regulate in a manner which will affect the activities of ''strangers'' as well as its employees, licensees, and licensee's employees. Similarly, the loss or diversion of special nuclear material may result in its coming into the possession of ''strangers'' as well as persons connected with the program. If the Commission is to effectively ''prevent any use or disposition * * * [of special nuclear material] which * * * [it] may determine to be inimical to the common defense and security'' again the activities of ''strangers'' must be affected as well as those of the program's personnel.

Finally, under subclause (3) the Commission is charged with the responsibility ''to govern any activity authorized pursuant to this Act * * * in order to protect *health* and to minimize danger to *life* or *property.*'' Since the activity authorized pursuant to the Act may, in the absence of power to provide for proper safeguards, jeopardize the health of, or be dangerous to the lives and property of ''strangers'' as well as participants in the program, it is reasonable to assume that Congress charged the Commission with responsibilities in this respect toward both. But to fulfill these responsibilities effectively, the Commission must have been given the power to regulate in a manner which will affect the activities of each class. Thus, each of the subclauses of Section 161(i) expresses a purpose which the Commission would not be able to effectively accomplish without the authority to

issue regulations affecting "strangers." This circumstance, we submit, compels the conclusion that such authority was comprehended by enactment of the Section.

(5) Nor is it significant, despite appellant's suggestion to the contrary (Br. 29-31), that the only regulations which the Commission had issued under the authority of Section 161(i), prior to the April 11, 1958 Regulation, "pertained to activities of licensees and other persons authorized under the Act to engage in some part of the atomic energy program" (Br. 31). Merely because those regulations all related to the activities of licensees and were specifically applicable only to persons connected with the program is no reason why the Commission could not invoke the clear words of the statute by promulgating the regulation involved herein. Since the Commission deemed the regulation necessary to fulfill the responsibilities entrusted to it, it was proper, and indeed necessary to promulgate the regulation under the authority given it in Section 161(i).

C. The enactment of a separate trespass provision (42 U.S.C. 2278a (a)) did not preclude the Commission from acting under Section 161(i).

Appellant further contends (Br. 24-29) that the enactment of Section 229(a) of the Atomic Energy Act of 1954, as amended, (42 U.S.C. 2278a (a))—the so-called "trespass" section—precluded the Commission from acting under Section 161(i).

The trespass section referred to by appellant, however, was designed to give the Commission authority

"to issue regulations relating to entry upon * * * any facility, installation, or real property subject to the jurisdiction, administration or in the custody of the Commission." (42 U.S.C. 2278a (a)). In explaining the application of the trespass provision to specific instances, the Senate Report on the bill which later became Section 229 limits the property covered by the Section "to property in which the title is in the United States or * * * is leased by the United States for use of the Commission." (S. Rept. No. 2530, 84th Cong., 2d sess., p. 2). Since, in this case, the designated Danger Area to which the April 11, 1958 Regulation pertained was not owned or leased by the United States for the use of the Commission, the trespass section was clearly inapplicable. Regulations promulgated under the authority of the trespass section must necessarily relate to areas in which the United States has a proprietary or possessory interest and a prosecution for violation of such regulations would involve merely the punishment of an interference with that interest. Here, however, the Commission had no proprietary or possessory interest over the designated danger area which interest it was seeking to protect by issuance of the Regulation. Rather, to fulfill the responsibilities given it by the legislature, the Commission promulgated a regulation designed, *inter alia,* "to avoid any unnecessary delay or interruption of" an authorized Commission activity. By promulgating the Regulation the Commission, acting for the United States, did not seek to prevent the unauthorized entry upon an area owned

or leased by it (a necessary corollary of a trespass violation) but sought instead to exercise control over its own nationals, properly subject to the jurisdiction of the United States, both to protect their health and property and to prevent them from interfering with an activity important to the preservation of our national defense. Inasmuch as the regulation was expressly made applicable only to those persons owing allegiance to the United States, it was a proper exercise of jurisdiction though it pertained to an area outside of the territorial limits of the United States.[3] Cf. *Blackmer v. United States,* 284 U.S. 421; *United States v. Bowman,* 260 U.S. 94; *Cook v. Tait,* 265 U.S. 94.

The Regulation of April 11, 1958 was not designed simply to prevent unauthorized entry. It was promulgated to avoid unnecessary delay or interruption of the test activity and to protect the health and safety of the public. The presence in the Danger Area of an unauthorized vessel such as appellant's "Phoenix" would plainly delay the carrying out of the HARDTACK test series. Such a delay, in the view of the responsible officers of the Government, would be directly prejudicial to the defense interests of the United States. Moreover, entry into the Danger Area by such unauthorized individuals could, again in the view of responsible officials, result in the threatened compromise of Restricted Data and the diversion of special nuclear material as defined in the Act (42

[3]See *infra,* pp. 42-48, for a more detailed discussion of this point.

U.S.C. 2014(t)). It is obvious also that undetected entry into this area would constitute a serious hazard to the persons and property of the appellants. For these reasons, therefore, it is frivolous to contend that the contested regulation was a "mere trespass" provision.

By the clear words of the statutes themselves, it can be readily observed that the sections contemplate entirely unrelated problems. Under the trespass section, regulations could be promulgated which would prohibit a mere unauthorized entry[4] much like an unauthorized entry upon other government installations. On the other hand, Section 161(i) contemplates regulations promulgated to "protect Restricted Data"; "guard against loss or diversion of special nuclear material"; and "to govern any activity pursuant to this Act * * * in order to protect health and to minimize danger to life and property." The dangers to the proper accomplishment of these purposes, which Section 161(i) was designed to give the Commission authority to prevent could result from an infinite variety of circumstances. Of necessity, Congress intended to vest the Commission with authority to issue regulations when the accomplishment of those purposes is endangered by any of these circumstances. One such circumstance, which we submit might readily have been foreseen as presenting a danger to the section's purposes, is the presence of undetected or un-

[4]At the present time no implementing regulations have been issued under the authority of the trespass section and hence, because Section 229 is not self-executing, there could be no prosecution thereunder (See 42 U.S.C. 2278a (a)).

authorized persons in areas where Restricted Data, special nuclear material, or radiation in such quantity as to be injurious to health and property are located. Consequently, we think that it is reasonable to assume that Congress contemplated the issuance of regulations under the authority of Section 161(i), and to accomplish its purposes, governing locomotion or navigation through these areas. The only limitation, which is expressed in all three subclauses of the section, is that the regulations be issued only in connection with activities authorized by the Act.

The subsequent enactment of Section 229(a) did not, we submit, limit the Commission's authority under Section 161(i). To the extent that these sections might possibly overlap, no such case of overlapping is presented here, since, as we have previously noted (*supra,* pp. 21-23), Section 229(a) pertains only to areas in which the United States has a proprietary or possessory interest. In addition, Section 229(a) would authorize regulations to prevent entry upon Government property where no Restricted Data, or special nuclear material were located and which did not present a hazard to life or property whereas regulations prohibiting entry issued under the authority of 161(i) must be related to the accomplishment of the purposes of that statute. The contested regulation was clearly so related.

Moreover, the interests to which each of the purposes of Section 161(i) pertain are all highly important to the national defense of the United States and the health and well-being of its citizens. They are

all far superior in our hierarchy of values than the mere interest in protecting the property owned by our government. Consequently, the penalty provided as a deterrent to those who would jeopardize those interests could, quite conceivably, be made more severe than in the latter case.

In any event, the mere fact that a person could by one act conceivably violate two regulations issued under Sections 161(i) and 229(a) respectively, would not preclude the Government from electing to proceed under either or both. So long as the offenses defined in the statute (as implemented by the regulations) were not identical, prosecution could be instituted under both. *Kendrick v. United States,* 238 F. 2d 34, 36 (C.A. D.C.); *Perry v. United States,* 227 F. 2d 129 (C.A. 5). And, as pointed out in *Ehrlich v. United States,* 238 F. 2d 481, 485 (C.A. 5):

> It is settled law, United States v. Gilliland, 312 U.S. 86, 61 S. Ct. 518, 85 L. Ed. 598, that where a single act violates more than one statute, the government may elect to prosecute under either. A defendant cannot complain merely because the charge against him is brought under the statute carrying the more serious penalties when two statutes punish the same general acts (citing cases).

Assuming, therefore, that a case were presented, wherein (because the tests were being conducted on property owned or leased by the United States) regulations preventing entry could have been promulgated under both Sections 161(i) and 229(a), but only one

regulation was issued and that under 161(i), it is a clear corollary to the rules set forth by the cases cited above, that a person violating the regulation could not complain that it was issued under the statute carrying the greater penalty. Appellant's argument, in the context of the circumstances presented in this case, places him in no better position.

II.

SECTION 161(i), AS INTERPRETED BY THE GOVERNMENT, IS NOT TOO VAGUE AND INDEFINITE TO SUPPORT CRIMINAL PENALTIES ATTACHED TO VIOLATIONS OF REGULATIONS PASSED PURSUANT THERETO. NOR IS IT AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER TO AN ADMINISTRATIVE AGENCY.

Appellant next contends (Br. 34-42) that "Section 161(i), as interpreted by the Government, is constitutionally too vague and indefinite to sustain the attempted criminal regulation." (Br. 34). He makes no claim that, either the Section itself (see Br. 41) on its face, or the April 11, 1958 Regulation (see Br. 39, n. 15) implementing it, are unconstitutionally vague and indefinite.[5] He argues rather that, as interpreted by the Government, Section 161(i) is as broad as Section 161(q) (42 U.S.C. 2201(q)) which grants the Commission general authority to "make, promulgate, issue, rescind and amend such rules and

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[5]Though appellant suggests that some aspects of the regulation "were unquestionably vague and without intelligible standards," he specifically refrains from claiming that it was unconstitutionally vague (Br. 39, n. 15).

regulations as may be necessary to carry out the purposes of this Act" and to which, because of the Congressional awareness of constitutional infirmities which might ensue, no criminal sanctions were attached.[6] In addition, appellant argues that if Section 161(i) is to be afforded the interpretation placed upon it by the Government, it would then constitute an unconstitutional delegation of legislative power to an administrative agency. We submit that both of these contentions lack merit.

As appellant accurately reports (Br. 35-37) Congress, in enacting the general penal provision contained in Section 223 of the Act (42 U.S.C. 2273) was careful not to make it applicable to violations of regulations issued under the general grant of authority contained in Section 161(q) (42 U.S.C. 2201(q)). The purpose and effect of this latter provision are clearly set forth in the following passage from the Senate Report on the bill which later was enacted and is now Section 161(q) (S. Rept. No. 603, 83rd Cong., 3d Sess., p. 4):

> Section 7 of the bill gives the Commission power to issue rules and regulations under the Atomic Energy Act. This is a power ordinarily granted to administrative agencies, and the Atomic Energy Commission has heretofore frequently acted on an implied grant of such power. It is thought

[6]Since appellant assumes that the Commission, in promulgating the regulation, acted solely under the authority granted in subclause (3) (Br. 16) his argument here is confined to the Government's interpretation of that subclause. As we have attempted to show in our argument under Point IA, *supra,* pp. 5-11, this assumption is unfounded.

> desirable to spell out this power in statutory form so there could be no question of the authority to issue rules and regulations.
>
> Since the criminal provisions of the Atomic Energy Act do not apply to infractions of general rules and regulations, this section would not enlarge any powers of the Atomic Energy Commission to issue rules and regulations which would subject violators thereof to criminal punishment.

As the Senate Report points up, therefore, Section 161(q) is a mere housekeeping provision, very much like general regulatory authority granted to other agencies of the government, designed to authorize regulations pertaining to the internal affairs of the Commission. Unlike Section 161(i) which provides for the issuance of regulations only for specified purposes, criminal sanctions do not attach to regulations issued under 161(q). To equate 161(i)—a statute designed to protect national security and to safeguard the health and welfare of the people, however, with Section 161(q), a mere housekeeping provision, as appellant would have us do, is to ignore the very purpose for which each section was enacted.

Appellant argues, however, that, as interpreted by the Government, Section 161(i) is as broad and indefinite as Section 161(q). His argument rests upon the Government's interpretation of subclause (3), since, in his view, that subclause constituted the sole basis of the Commission's exercise of authority in promulgating the April 11, 1958 Regulation. Specifically, appellant challenges an interpretation of sub-

clause (3) which would read it as authorizing regulations "to govern any activity authorized pursuant to this Act * * * in order to protect health and to minimize danger to life and property" (See 42 U.S.C. 2201(i)(3)). It can be readily seen by comparison of this standard with the general language used in Section 161(q) (42 U.S.C. 2201(q)), however, that it much more clearly delineates the permissible area of regulatory authority than is the case with respect to the language used in the latter Section. Subclause (3) authorizes regulations, in connection with any activity authorized under the Act, to carry out a single specific purpose expressed in the subclause itself—*i.e.*, "to protect health and to minimize danger to life and property." Under Section 161(q), however, the Commission may promulgate any regulations which pertain to the administration of its internal affairs. Thus, even as interpreted by the Government, it is apparent that subclause (3) of Section 161(i) does not contain the broad general grant of authority which characterizes Section 161(q).

It is true, of course, that a vague and indefinite statute—that is, one under whose terms "men of common intelligence must necessarily guess at its meaning and differ as to its application"—violates the right to due process. *Lanzetta v. New Jersey,* 306 U.S. 451, 453. However, such general terms as "public interest," "public convenience, interest or necessity," and "excessive profits" have been held to constitute a sufficient standard to satisfy the constitutional requirements. *New York Central Securities Co. v.*

United States, 287 U.S. 12, 24; *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 138; *Lichter v. United States,* 334 U.S. 742, 763. The standard set forth in subclause (3) of 161(i) is, we submit, no less definite and certain than those upheld by the Supreme Court in these cases.

Appellant further argues, however, that, as construed by the Government, subclause (3) should be held to be too vague since, allegedly, he "could not have known from looking at the statute whether it authorized the Commission to issue the contested regulation" (Br. 40). But that circumstance, even if assumed for present purposes to be a fact, is of no aid to appellant. A similar argument was considered and rejected by the Supreme Court in *United States v. Grimaud,* 220 U.S. 506. That case involved the validity of an indictment issued upon a violation of a regulation promulgated by the Secretary of Agriculture. The Court said (at page 521):

> It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep upon a forest reserve. But the statutes, from which we have quoted, declare, that the privilege of using reserves for "all proper and lawful purposes" is subject to the proviso that the person so using them shall comply "with the rules and regulations covering such forest reservations." * * *
>
> If, after the passage of the act and the promulgation of the rule, the defendants drove and grazed their sheep upon the reserve, in violation of the regulations, they were making an unlawful use of Government property. In doing so they

thereby made themselves liable to the penalty imposed by Congress.

Implementation of subclause (3) (as well as (1) and (2)) of Section 161(i) by a regulation of the type with which we are concerned in this case (*i.e.*—a regulation prohibiting unauthorized entry) is, we submit, even more readily comprehended by the language of subclause (3) than the implementation of the statute upheld in the *Grimaud* case, *supra.* The important factor in such circumstances is whether the regulation itself clearly spells out the prohibited activity and, as appellant himself concedes, there was nothing vague or indefinite about the regulation of April 11, 1958. The persons and area affected by the regulation and the length of time in which it was to remain in force and effect were clearly set forth in the regulation itself. Certainly, "men of common intelligence" would not "necessarily guess at its meaning and differ as to its application." *Lanzetta v. New Jersey, supra,* at page 453.

Finally, appellant argues that even if the clarity of the regulation could cure the constitutional defects of a statute which might raise some doubt regarding the manner in which it could be implemented, the vague grant of criminal regulatory authority (which he suggests is presented in this case) raises questions concerning the possible unconstitutional delegation of legislative power to an administrative agency.

It is elementary that a valid legislative regulation, that is, one made pursuant to constitutional and statu-

tory authority, has the same force as though prescribed in terms by statute. *Atchison, T. & S.F. Ry. Co. v. Scarlett,* 300 U.S. 471, 474; *Tyson v. Commissioner of Internal Revenue,* 68 F.2d 584, 587 (C.A. 7), certiorari denied, 292 U.S. 657; *E. Griffiths Hughes, Inc. v. Federal Trade Commission,* 63 F.2d 362, 363 (C.A. D.C.). Moreover, a legislature may authorize an executive officer or body to make rules and regulations for the purpose of carrying out the objects of a statute and may make a violation of such rules a criminal offense. *United States v. Grimaud,* 220 U.S. 506; *General Motors Corp. v. Blevins,* 144 F. Supp. 381, 396 (D. Colo.). The only limitation upon this power is that Congress, in delegating to the President or to an administrative agency the power to implement by regulation a broad policy laid down by statute must adopt an intelligible standard to which administrative action must conform. *Sunshine Coal Co. v. Adkins,* 310 U.S. 381, 398; *United States v. Rock Royal Cooperative,* 307 U.S. 533, 577. As we have attempted to show (*supra,* pp. 29-30) subclause (3) of Section 161 (i) provides such a standard and, moreover, we think that our reasoning applies with equal force and effect to subclauses (1) and (2). Certainly, if in *Yakus v. United States,* 321 U.S. 414, 420, the Supreme Court could sustain a conviction for violation of a regulation issued pursuant to authority granted to the administrator to issue such regulations which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act," there is little danger that a conviction for the violation of the regu-

lation in this case is violative of due process. In the *Yakus* case, *supra,* at 423, the Court upheld the grant of authority to issue regulations fixing prices, upon a finding that the specified purposes of the Emergency Price Control Act of 1942 (involved in that case) clearly denoted the objective to be sought by the Administrator in fixing prices and contained sufficient standards defining the boundaries within which prices having that objective were required to be fixed. The general purposes of the Atomic Energy Act of 1954 are contained in Section 3 of the Act (42 U.S.C. 2013). Among these purposes are *(ibid.)*

"to provide for—

* * * * *

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use and production of atomic energy and special nuclear material so directed as to make maximum contribution to the common defense and security and the national welfare;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public."

Section 161(i) of the Act contains standards which are no less definite in delineating the boundaries

within which regulations having the objectives specified by these enumerated purposes may be promulgated than those which were contained in the Emergency Price Control Act had in relation to the objectives specified in that statute. In addition, the Court, in *Yakus* (at p. 424) distinguished *Schechter Corp. v. United States,* 295 U.S. 495; (cited by appellant, Br. 40) by noting that no standards were provided in the *Schechter* case. Moreover, "[t]he function of formulating the codes [in that case] was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated." See also, *Fahey v. Mallonee,* 332 U.S. 245; *Sunshine Coal Co. v. Adkins, supra,* at page 331.

In view of the standards, previously upheld by the Supreme Court, it is clear that the standards set forth in Section 161(i) (3) as well as (1) and (2) are clear and definite enough to withstand the test of constitutional validity. Certainly, a statute which declares that regulations can only be issued in connection with activity authorized pursuant to the Act "in order to protect health and to minimize danger to life and property" sets forth a no less definite standard. The regulation of April 11, 1958 contained a specific prohibition which the defendant wilfully violated. Criminal penalties for the violation of such a regulation are specifically provided for in the Act itself (42 U.S.C. 2273). Since the regulation was promulgated in the exercise of a lawful authority, and since the defendant wilfully violated the regulation, criminal penalties must attach to his act.

III.

THE PACIFIC NUCLEAR TESTS AND THE REGULATION UNDER WHICH APPELLANT WAS CONVICTED VIOLATE NO INTERNATIONAL COMMITMENTS OF THE UNITED STATES.

A. Appellant contends that the Pacific nuclear tests and the regulation violate international commitments of the United States, to wit, the so-called "human rights provision" of the Charter of the United Nations, the Trusteeship Agreement for the Territory of the Pacific Islands and the principle of freedom of the seas which the United States is committed by international law to respect. Having established these violations by allegation (not sustained by evidence), appellant then argues that Congress never intended to authorize the tests or the contested regulation because a contrary construction would ascribe to Congress an intent to abrogate the international commitments of the United States.

1. The Charter of the United Nations, as any other treaty, is a compact between sovereign nations. The Charter provisions relied upon by appellant are not self-executing and they vest no private legal rights in the appellant:

> "The question whether our Government is justified in disregarding its engagements with another nation is not one for the determination of the Courts."

The Chinese Exclusion Case, 130 U.S. 581, 602; *Whitney v. Robertson,* 124 U.S. 190, 194; *Botiller v. Dominguez,* 130 U.S. 238, 247; *Head Money Cases,* 112 U.S. 580, 598.

But even if the Court should disagree with our argument in this respect, we show here that appellant's attack on the Act (and Regulation) on this ground is without merit.

Even if it were true that the Act conflicts with the Charter of the United Nations, the Act, being equally with the Charter "the supreme Law of the Land" (Const., Art. VI, cl. 2) and being later enacted, would supersede any conflicting provisions of the Charter. As stated in *Reid v. Covert,* 354 U.S. 1, 18: "This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." To the same effect are *Head Money Cases, supra,* at 598-9; *The Chinese Exclusion Case, supra,* at 600; *Whitney v. Robertson, supra,* at 194.

What the appellant characterizes as the "human rights" provision of the Charter are Article I, paragraph 3, and Articles 55 and 56 (59 Stat. 1037, 1045-6).[7] These general objectives are obviously not

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[7]Article 1

The Purposes of the United Nations are:

* * * *

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;

* * * *

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations

self-executing. As stated in *Sei Fujii v. State of California,* 38 C.2d 718, 722-3, 724, 242 P.2d 617, 620-2:

> It is clear that the provisions of the preamble and of Article 1 of the charter which are claimed to be in conflict with the alien land law are not self-executing. They state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons. It is equally clear that none of the other provisions relied on by plaintiff is self-executing. Article 55 declares that the United Nations "shall promote: * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," and in Article 56, the member nations "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." Although the member nations have obligated themselves to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated

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among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 56

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.

The language used in Articles 55 and 56 is not the type customarily employed in treaties which have been held to be self-executing and to create rights and duties in individuals . . .

* * * * * * *

The provisions in the charter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification. Instead, they are framed as a promise of future action by the member nations . . .

Since these provisions of the Charter are not self-executing, they do not confer any rights enforceable by the Courts. As stated in *Foster v. Neilson,* 2 Pet. 253, 314:

. . . Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.

See also, the *Sei Fujii* case, *supra.* Even if these provisions of the Charter were, however, deemed to be self-executing, it is plain that they do not constitute a commitment by this Government to refrain from taking any measure which Congress may deem appropriate to the national defense.

2. Chapter XII of the Charter of the United Nations establishes an "International Trusteeship System" (59 Stat. 1048-50).[8] The Trusteeship System is made applicable to territories placed thereunder by means of trusteeship agreements (Art. 77). The trusteeship agreement is required to include the terms under which the trust territory is administered and to designate the administering authority (Art. 81). A trusteeship agreement may designate "a strategic area or areas" in the trust territory to which the agreement applies (Art. 82). All functions of the United Nations relating to such strategic areas are exercised by the Security Council (Art. 83).

The Trusteeship Agreement for the Trust Territory of the Pacific Islands[9] was approved by the Security Council of the United Nations on April 2, 1947, and was approved by the President on July 18, 1947 (61 Stat. 3301). The President's approval was authorized by a joint resolution approved July 18, 1947 (61 Stat. 397).

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[8]The relevant provisions of the Charter are set forth in the Appendix, pages iii-iv, *infra.*

[9]The relevant provisions of the Trusteeship Agreement are set forth in the Appendix, pages i-iii, *infra.*

This agreement places the Pacific Islands formerly held by Japan under League of Nations mandate (which included Eniwetok and Bikini) under the trusteeship system, designates this territory as a strategic area, and designates the United States as the administering authority (Arts. 1, 2). See *Callas v. United States,* 253 F. 2d 838 (C.A. 2). The United States is given "full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement" and is entitled to establish military bases and fortifications and station armed forces in the territory (Arts. 3, 5). The agreement specifically provides that areas of the territory "may from time to time be specified by it [the United States] as closed for security reasons" (Art. 13). During discussion of this agreement in the Security Council, the American representative stated this Government's position that Article 13 authorizes it to close areas of the Trust Territory, and that article was unanimously adopted by the Security Council (extract from the official records of the Security Council, 124th meeting, 2 April 1947 is set forth in the Appendix, pages v-vi, *infra*).

Accordingly, it is clear that the closing of the Pacific Proving Grounds in connection with the nuclear weapons tests is in accordance with the Charter of the United Nations.[10]

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[10]The appropriate forum for the hearing of complaints of violation of the Trusteeship Agreement is the Trusteeship Council of the United Nations. As is stated in Appellant's Brief, such a complaint was made in May 1954 and was rejected by a resolution of the Council on March 29, 1956. In July 1956 the Atomic

3. Next, appellant asserts that the closing off of a danger zone of 390,000 square miles of the Pacific Ocean is a massive invasion of the international freedom of the high seas. In the first place, the general statements about freedom of the seas contained in Appellant's Brief (pages 51-55) do not have the status of treaties, which are part of "the supreme Law of the Land" (Const., Art. VI, cl. 2). In the second place, even if it were shown that the action of the Atomic Energy Commission is contravening some principle of international law, this appellant has no standing to raise the point, since the only redress for alleged violations of international law is by diplomatic negotiations between the nations affected (see *supra,* pp.

Energy Commission published a document entitled "Major Activities in the Atomic Energy Program, January-June 1956." At page 17 appears the following:

United Nations Trusteeship Council,
Weapons Tests.

After the Trusteeship Council of the United Nations received petitions protesting against testing nuclear devices in and near the Trust Territory of the Pacific Islands, Commission staff assisted the Department of State in preparing a reply.

In reply to the petitions, the United States stated that only after careful, serious and comprehensive studies was a decision reached to carry out the tests in the Marshall Islands; that the United States had earnestly sought a fully safeguarded international agreement that would make further tests unnecessary, but that until an agreement had been reached "elementary prudence required the United States to continue its tests;" but that every precaution would be taken to assure that fall-out would occur only in the danger area surrounding the Eniwetok Proving Ground which includes no islands inhabited by the Marshallese; that there was no need to evacuate the Marshallese from their home islands, that emergency evacuation plans had been formulated should such action become necessary; and that Marshallese were being trained in emergency health measures.

The United Nations Trusteeship Council on March 29 approved by a 9 to 4 vote a resolution approving the tests in the Marshall Islands, provided all necessary safeguards were taken.

36-40). In the third place, even if there were conflicts between the Atomic Energy Act of 1954 and some principle of international law, the Atomic Energy Act would prevail (see *supra,* p. 37).

Proper analysis demonstrates the lack of substance in appellant's contentions. The issue here presented is not Commission jurisdiction over the high seas, nor is it freedom of the seas; properly viewed, the issue for consideration is whether the Commission's power to issue regulations in implementation of its statutory responsibilities permits extraterritorial application of a regulation designed to safeguard an authorized Commission activity carried on outside the United States. We submit that insofar as such a regulation purports to cover only those persons subject to the jurisdiction of the United States, the Commission has that power.

There is no constitutional bar, nor is there one in international law, to the United States making its laws applicable to American citizens on the high seas or even in a foreign jurisdiction. It has long been recognized that this Government has extraterritorial jurisdiction over its citizens—a jurisdiction that is dependent upon the personal relationship of the citizen to his country of allegiance and not upon the geographic location of that citizen. The question, in short, is not whether there is power to extend municipal law to citizens beyond the territorial confines of this country but rather whether Congress has intended to make such an extension. See *Blackmer v. United States,* 284 U.S. 421; *United States v. Bowman,* 260 U.S. 94; *The Appollon,* 9 Wheat (22 U.S.) 362; *Cook v. Tait,* 265

U.S. 47; *United States v. Bennett,* 232 U.S. 299; see also, II Moore, *International Law Digest,* pp. 255-256; I Hyde, *International Law,* p. 424.

The principles of law applicable in this regard were summarized by the Supreme Court in *Blackmer v. United States, supra,* at page 421, a case which sustained the reach of domestic law to an American citizen residing in a foreign country and the imposition of criminal sanctions as a consequence thereof. In *Blackmer* the Court stated (284 U.S. at 436-7):

> By virtue of the obligations of citizenship, the United States retained its authority over [defendant] and he was bound by its laws made applicable to him in a foreign country. Thus, although resident abroad, the petitioner remained subject to the taxing power of the United States. *Cook v. Tait,* 265 U.S. 47, 54, 56. For disobedience to its laws through conduct abroad, he was subject to punishment in the courts of the United States. *United States v. Bowman,* 260 U.S. 94, 102. With respect to such an exercise of authority, there is no question of international law but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government. While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power.

In fathoming legislative intent in the present case, it must be presumed that the provisions of the Atomic

Energy Act of 1954 are co-extensive in territorial reach with the activities authorized thereunder by the Congress. Cf., *United States v. Bowman, supra,* at 94, 101-102; *Maul v. United States,* 274 U.S. 501, 511. To determine then whether the regulatory powers granted the Commission can be exercised in such a manner as to be extraterritorial in scope, the activities which are to be implemented or safeguarded must first be examined. In the instant case, the elements militating for extraterritorial application are clear both from an examination of the relevant provisions of the Act and the pertinent legislative background.

Under Section 91(a) of 1954 Act, the "Commission is authorized to * * * conduct experiments and do research and development work in the military application of atomic energy" (42 U.S.C. 2121(a)). The phrase "research and development" is statutorily defined by Congress to include (42 U.S.C. 2014(v)):

> * * * (1) theoretical analysis, exploration, or experimentation; or (2) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials and processes.

Palpably then, the Act, as literally read, is broad enough in scope to embrace the type of nuclear test activities engaged in by the United States at Eniwetok and Bikini Atolls for the past twelve years. Moreover, both prior to the passage of the 1946 and 1954 Atomic Energy Acts, Congress was aware of the fact

that tests of this type could be conducted only beyond the territorial limits of the United States and that the Marshall Islands and surrounding waters were to be the site of such tests. The proposed holding of the first such test, Operation Crossroads, was detailed to the Special Senate Committee on Atomic Energy on January 24, 1946, during the course of that Committee's study of legislation to control the development and use of atomic energy (testimony of Vice Admiral W. H. P. Blandy, Hearing on S. Res. 179, Part 4, Special Committee on Atomic Energy, United States Senate, 79th Cong. 2d Sess.). Of particular interest in the present connection is the emphasis placed by that testimony on measures taken to protect health and safety, such as naval patrols "to keep ships out of the area for their own protection, and also to keep them away from contaminated water, water containing radioactive substances after the test as that water drifts westward" (*ibid.*). In succeeding years, reports of impending tests at the Pacific Proving Ground, and of the results of those tests, have been made by the Commission to the Joint Committee on Atomic Energy—in accordance with the statutory enjoinder to keep the Committee "fully and currently informed" (42 U.S.C. 2252)—and test activities have been communicated to the Congress itself through the agency's Semiannual Reports (42 U.S.C. 2016).[11] The Atomic Energy Act of 1954—and in particular Sec-

[11]See, e.g., Semiannual Reports dated Jan. 1953, pp. 16-17; July 1953, pp. 13-14; Jan. 1954, pp. 12-13; Jan. 1955, pp. 14-16; Jan. 1956, pp. 38-39; July 1956, p. 8; Jan. 1957, p. 11; Jan. 1958, pp. 276-277.

tion 91(a), *supra*—was enacted and implemented with that background. Furthermore, appropriations made by Congress for the maintenance and development of the facilities at the Pacific Proving Ground and the holding of tests there bear direct witness to a continuing legislative cognizance and affirmation of the extraterritorial activities conducted in accordance with the statutory mandate to carry out weapons tests.[12]

The extraterritorial scope of the test activities authorized by the Act having been established, it is a necessary corollary that the power to issue regulations to implement those activities and to safeguard their integrity is co-extensive in territorial reach. Thus, the powers granted the Commission to "prescribe such regulations or orders as it may deem necessary * * * to protect restricted data," or "to govern any activity authorized pursuant to this Act * * * in order to protect health and to minimize danger to life or property," or generally to "make * * * such rules and regulations as may be necessary to carry out the purposes of this Act" (42 U.S.C. 2201(i) and (q)), all must be read as authorizing regulations equal in reach to the statutory activities which they implement. A narrower reading would, in fact, contravene the plain language of the cited authorizations.

Accordingly, the regulation in issue, implementing as it does a statutorily authorized Commission function performed beyond the borders of the United States,

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[12]See, e.g., Section 101(f)(5), Public Law 141, 84th Cong., 1st Sess. (69 Stat. 292).

is not subject to attack merely upon the ground that it too is extraterritorial in reach. This result is not altered by appellant's references to the "freedom of the seas" doctrine of international law. The doctrine on which they rely, whatever its application to the relationships between two nations or between one nation and the citizens of another, has never been thought to embody restrictions on a nation in dealings with its own citizens. To the contrary, a corollary of the "freedom of the seas" doctrine is the continuing amenability of an individual, while on the high seas, to the laws of the nation claiming his allegiance. See e.g., II Hackworth, *Digest of International Law,* p. 656 (quoting from *S. S. Lotus,* Permanent Court of International Justice); cf. *United States v. Bowman,* 260 U.S. 94; *Wilson v. McNamee,* 102 U.S. 572; *Maul v. United States,* 274 U.S. 501; *United States v. Rodgers,* 150 U.S. 249, 264.

B. We have attempted to show that there was no violation of any international commitments of the United States in the conducting of the tests or in the issuance of the regulations; moreover, *arguendo,* even if there had been, it would avail appellant naught.

We now turn for brief mention to a question of responsibility. The Commission is not only vested with *authority* to carry on activities such as the one in question and to issue implementing regulations (see *supra,* pp. 45-47), but it is affirmatively charged with *responsibilities*—responsibilities relating, *inter alia,* to the defense of the United States, the safeguarding of Restricted Data and the protection of the health and

safety of the public (cf., 42 U.S.C. §§ 2011-2013, 2037, 2121, 2153, 2161-2165). The instant regulation was issued in discharge of these responsibilities. The presence in the Danger Area of an unauthorized vessel such as appellant's "PHOENIX" would plainly delay the carrying out of the Hardtack test series. Such a delay, in the view of the responsible officers of the Government would be directly prejudicial to the defense interests of the United States. Moreover, entry into the Danger Area by such unauthorized individuals could, again in the view of responsible officials, compromise Restricted Data as defined in the Act. Finally, it is obvious that undetected entry into this test area would constitute a serious hazard to the persons and property of the entrants. Appellant may insist that his safety is a matter for his sole concern; however, as we have heretofore stated, elemental considerations as well as the Commission's statutory responsibilities in this regard do not permit the agency to stand aside.

The Government submits therefore that the controverted restrictions were both necessary and lawful. The temporary nature of these limitations and their applicability in an area normally untraveled by those individuals subject to the regulation certainly does not detract from that conclusion. Appellant characterizes his proposed entry into the proscribed Danger Areas to a "protest" against the testing of nuclear weapons. Our form of government allows ample opportunity for protests against Government action within the framework of law. We think it a reason-

able statement, however, that the decision of the legislative and executive branches as to the necessity for such tests is not subject to a "protest" the nature and purpose of which is to interfere with that execution of that decision.

C. All the questions of law raised by appellant in III have been decided adversely in *Pauling v. McElroy,* 164 F. Supp. 390, 393.

IV.

APPELLANT WAS NOT DEPRIVED OF ANY CONSTITUTIONAL RIGHTS UNDER THE REGULATION.

Appellant apparently has abandoned the argument which he made below that the Administrative Procedure Act (5 U.S.C. 1003) required an opportunity for notice and hearing before the promulgation of the regulation (R. 23, 355), but passing reference is made to this contention in his footnote 32 (Br. 64). Therefore no attempt will be made here to show that the issuance of the regulation complied with the Administrative Procedure Act. Instead, this argument will be included in the appelllee's answering brief in *Bigelow, et al. v. U.S.,* No. 16,018.[13] The appellee's argument here will be confined to the question of alleged deprivation of appellant's constitutional rights and to the question of the requirement of noticing and hear-

[13]Appellants' Brief in *Bigelow* adopts the arguments of appellant here numbered I through IV. Additionally, the *Bigelow* appellants argue that the Regulation was void because of the failure of A.E.C. to comply with the Administrative Procedure Act's notice and hearing requirements.

ing as a matter of constitutional due process. Appellant contends that the regulation infringes upon his freedom of protest under the First Amendment, as well as upon his freedom of movement under the Fifth Amendment. We do not argue here with the general statements appellant makes regarding these fundamental rights, or with the authorities cited. However, appellant *assumes* that these rights are absolute. That they are not needs no citation of authority. The right to travel, for instance, cannot be denied on the grounds of one's beliefs or associations, but can for reasons that are good and sufficient.[14] The same principles apply to the so-called right to protest. As we have already shown (see *supra,* pp. 5-6, 48-49), the Commission issued the regulation in the discharge of its responsibilities—responsibilities relating, *inter alia,* to the defense of the United States, the safeguarding of Restricted Data, and the protection of the health and safety of the public. The Government submits, therefore, that the controverted restrictions were both necessary and lawful. The temporary nature

[14]The situation here is to be distinguished from that in *Kent v. Dulles,* 357 U.S. 116. The following considerations should be borne in mind in connection with the instant case: here, there is involved a restriction applicable to *all* persons subject to the jurisdiction of the United States; this restriction is applicable for only a limited period of time; further, such action is necessary to prevent interference with a statutorily authorized activity and for the protection of health and safety, as directed by Congress. Finally, the disputed restriction applies in an area rarely entered by U.S. citizens for either travel or business. In short, for those individuals who desire to travel through this danger area to reach another destination, the necessity to by-pass it can only be a matter of temporary inconvenience; only those persons who wish to enter the area to interfere with this Government's statutorily authorized nuclear test can be said to be frustrated in their venture.

of these limitations and their applicability in that area normally untraveled by those individuals subject to the regulation certainly does not detract from that conclusion.

Appellant states that the regulation was aimed solely at the crew of the "GOLDEN RULE" (and any others who might contemplate travel into the danger area as a means of public protest against testing).[15] He then concludes that the promulgation of the regulation was an "adjudicatory" rather than a "legislative" function, and that therefore the due process clause of the Fifth Amendment required notice and hearing regardless of any exceptions provided by the Administrative Procedure Act.

The fact that there was no evidence in the Court below regarding the "GOLDEN RULE" or the circumstances surrounding the issuance of the regulation coupled with the presumption that a commission charged with a duty has regularly, and consistent with the law, performed the same and has not acted arbitrarily in violation of the law, should be a sufficient answer to this argument. However, *arguendo,* we will assume the truth of the facts (not conclusions) alleged by appellant re the circumstances surrounding the issuance of the regulation. These facts still do not lend themselves to the conclusion that the issuance of the regulation was an "adjudicatory" rather than "legislative" action. The regulation was not aimed specifically at the members of the crew of

[15]See R. 358—appellant now adds for the first time the matter contained parenthetically here.

the "GOLDEN RULE" although their actions may have prompted the promulgation of the regulation.

One thing should be beyond cavil—it was not aimed at Earle L. Reynolds, appellant herein, who upon his arrival in Honolulu in May, 1958, subsequent to the issuance of the regulation, hadn't the slightest intention of making a protest voyage to the danger area (R. 419-20, 422-5). All United States nationals alike were affected by the regulation and nothing that the "GOLDEN RULE" crew or appellant here had done, as yet, was declared illegal. Rather, what was proscribed by the regulation was future conduct of any national who might choose to enter the danger area. This situation has no similarity to the quasi-judicial proceedings reported in *Philadelphia Company v. S.E.C.,* 164 F.2d 889, 175 F.2d 808, discussed by appellant (Br. 66-68).

In *American Communications Association v. Douds,* 339 U.S. 382, the Court upheld the validity of Section 9(h) of the National Labor Relations Act in the face of an attack made upon the grounds that the section was violative of the Constitution as a Bill of Attainder. The Court said (*id.* at 414):

> Here the intention is to forestall future dangerous acts; there is no one who may not by voluntary alteration of the loyalty which impels him to action, become eligible to sign the affidavit. We cannot conclude that this section is a Bill of Attainder.

Here, by the same token, the intention of the Commission was to forestall *future* action. Since past ac-

tion of the appellant was not declared unlawful by the Commission, by application of the rationale in *American Communications Association v. Douds, supra,* the regulation cannot be considered a Bill of Attainder or an "adjudicatory" action.

It is not disputed here that the action of the appellants in the *Bigelow* case (see *Bigelow, et al. v. U.S.,* No. 16,018) prompted the Atomic Energy Commission to issue the regulation here in issue.

However, the fact that this knowledge may have prompted the regulation in no way impairs the validity of the regulation itself. Indeed, it has been said:

> One step in the discovery of legislative meaning or intent is the ascertainment of the legislative purpose, i.e., the reasons which prompted the enactment of the law. * * * In seeking to ascertain the legislative purpose it is proper to look at the circumstances existing at the time of the enactment of the statute, to the necessity for the law, the evils intended to be cured by it, to the intended remedy, and to the law as it existed prior to such enactment. *Otoe and Missouria Tribe of Indians v. United States,* 131 F. Supp. 265, 272, certiorari denied, 350 U.S. 848.

It has repeatedly been held also that resort to Legislative History is proper to ascertain the legislative intent. See *United States v. Great Northern Ry.,* 287 U.S. 144; *Duplex Printing Press v. Deering,* 254 U.S. 443.

Indeed, the legislative history of many of our statutes contains recitals setting forth reasons prompting the passage of such acts.

Certainly if judicial pronouncements condoning the practice of inquiring into the contemporaneous events to determine Congressional intent have been made, the very fact that these events prompted the passage of the act could not in any way affect the validity of the act itself.

Judicial recognition has also been accorded to events which prompted legislation directed at particular groups of individuals. In *Galvan v. Press,* 347 U.S. 522, the Court took cognizance of the events which prompted the enactment of the statute:

> On the basis of extensive investigation Congress made many findings, including that in § 2(1) of the [Internal Security] Act that the "Communist movement . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary to establish a Communist totalitarian dictatorship," *and made present or former membership in the Communist Party, in and of itself, a ground for deportation* (emphasis supplied).

And again in *American Communications Association v. Douds, supra,* at 389 the Court noted:

> It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when

the dictates of political policy required such action.

Certainly the very acts of those individuals who would be affected by the statute prompted enactment of the legislation, and in no way whatsoever impaired the validity of the statute.

Analogously, contemporary events, relating to the promulgation of a regulation can be resorted to in order to ascertain the purpose of a regulation, and these events can be the motivating factors for the regulation itself.

V.

THE REFUSAL OF THE COURT BELOW TO GRANT A CONTINUANCE DID NOT UNDER THE CIRCUMSTANCES DEPRIVE APPELLANT OF ANY OF HIS CONSTITUTIONAL RIGHTS; HOWEVER, THE COURT'S REFUSAL TO PERMIT APPELLANT TO PROCEED IN PROPRIA PERSONA WAS ERROR.

A. Refusal of continuance.

Because appellant's brief presents an erroneous statement of the facts, unsupported by the record, it is necessary to restate here the course of the proceedings below.[16]

The appellant was arrested July 2, 1958, and committed by the U.S. Commissioner on July 8, 1958. The

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[16]The government does not quarrel with the basic proposition relied upon by appellant in his brief that a defendant may not be arbitrarily deprived of his right to counsel. The government only objects to appellant's attempt to distort the constitutional right to counsel into a club for the intimidation of the trial court. It will be noted that every one of the cases cited by appellant treats the Sixth Amendment, not as a weapon to be used as the defendant sees fit, but as a shield to protect the defendant against unfair prejudice.

appellant first appeared before the trial Court on July 21, 1958. He appeared with his chosen attorney (R. 2).[17] Appellant informed the Court that he wished to waive indictment (R. 3) and consent to prosecution of the instant case by information, which the Court permitted him to do (R. 5). He was thereupon arraigned. He then asked for and obtained a one-week continuance to plead or otherwise move (R. 5). The Government did not object to this short continuance but announced that it was prepared to afford the defendant his right to a speedy trial (R. 5).

The following day, July 22, 1958, appellant appeared again with counsel to ask the Court for permission to travel to Kwajalein (R. 6-10). This request was denied as premature, in that appellant had not made travel arrangements (R. 10).

On July 28, 1958, appellant's counsel filed a motion to dismiss (R. 21), noticed for hearing on August 6, 1958 (R. 308).

Also on July 28, 1958, appellant appeared before the Court with counsel to request permission to travel to Los Angeles, New York, and the District of Columbia, for the purpose of seeking additional (R. 43, 45)

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[17]Appellant states in his brief (at p. 68) that ". . . since he was immediately confronted with the prospect of indictment and criminal proceedings, appellant retained a local counsel, Mr. Katsugo Miho, not to undertake the defense of any subsequent criminal action, but only to handle preliminary matters . . ." Yet both appellant and Miho were fully aware of the fact that, absent a waiver, there could not possibly be any preliminary matters to handle, until after the next meeting of the grand jury, several months away (R. 321). This Court may wonder why appellant was so eager to get his case on the docket in July, yet so reluctant to have it go to trial a month later.

financial and legal assistance in his defense (R. 43-48). This request was granted (R. 48), counsel having assured the Court that the trip would not be a cause for delay (R. 44). Appellant made the trip and secured the services of Mr. Rauh (R. 321-322) as associate counsel.[18] Mr. Rauh did not enter an appearance for appellant, however, until September 25, 1958, for reasons personal to himself (R. 134, 329).

On August 6, 1958, the date noticed for the hearing on the motion to dismiss the information, appellant's counsel sought a continuance on the ground that he preferred to have his co-counsel, Mr. Rauh, argue the points of law raised.[19] The continuance was denied, the Court being of the opinion that co-counsel's presence was not necessary, since the issues involved could be raised again at trial, post-trial and appellate stages if the motion should be denied (R. 308).

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[18]Appellant now protests that this is not so; that Mr. Rauh was primary counsel and Mr. Miho was actually retained only for preliminary matters. It is significant, however, that neither appellant nor Mr. Miho mentioned this usual arrangement until the very eve of trial (R. 147) and *after* Mr. Rauh had entered the scene. In fact the record shows that they considered Mr. Rauh to be nothing more than co-counsel (R. 6, 16, 43, 45, 53, 86, 90, 97, 98, 103, 113), and also shows that Mr. Miho expected to try the case from the beginning (R. 91, 103, 106-110). Subsequent representations to the contrary could hardly be taken at face value by the Court.

[19]Appellant's brief alleges (at p. 69) that his counsel, Mr. Miho, secured an agreement from the U.S. Attorney's office to postpone this hearing to September 6, citing appellant and his counsel. The Government respectfully avers that the appellant is mistaken. The Government, of course, although it did not oppose the first continuance, could not consent to the repeated attempts to delay the trial, because its main witness was LCDR A. J. Bush, the commander of the U.S.C.G. Cutter Planetree. The Planetree obviously could not remain in port indefinitely, waiting for the trial.

The motion to dismiss was heard on August 6, 1958, and denied, whereupon appellant pleaded not guilty to the information, and his counsel requested a trial date subsequent to the return of appellant's yacht from Kwajalein (R. 89-90). The Government objected to delay on the ground that appellant had not made a showing that he needed the testimony of the persons aboard the yacht (R. 92).

The Court continued the matter of setting to August 11, 1958, to give the parties an opportunity to resolve the matter of the appellant's witnesses (R. 93-94). On August 11, 1958, the Government offered, and the Court ordered, an election to proceed only upon the substantive charge, thereby obviating the alleged necessity of delaying the trial to permit the attendance of persons aboard appellant's yacht (R. 126).

Failing to obtain a delay until the yacht's arrival, appellant's counsel raised on August 11, *for the first time,* the alleged inability of proposed co-counsel, Mr. Rauh, to appear in Hawaii until late September (R. 103). The Court was understandingly unwilling to accept appellant's unsubstantiated and unspecific representations (R. 113-114) regarding this matter, particularly since Mr. Rauh had not entered an appearance at the time. The Court having refused to adjust its calendar to the convenience of Mr. Rauh (R. 127), counsel informed the Court that he would be prepared to go to trial on August 25, 1958 (R. 123, 128), and the trial was set for that date (R. 129).

On August 18, appellant's counsel filed a motion for continuance (R. 130) to September 24, 1958, an unavailable date (R. 169, 313). The motion was supported by Mr. Rauh's affidavit, which set forth in general terms his reasons for not wanting to appear for appellant on the date set for trial (R. 133-135).

This affidavit alleged that proper attention to appellant's case, including travel time, preparation, and the trial itself, would require one week (R. 135).[20]

The affidavit further alleged that during the week prior to August 25, Mr. Rauh was planning a vacation, and that during the week of August 25, he planned to write a brief that was not due until October (R. 134, 146). These two activities, which Mr. Rauh evidently considered more important than his obligations to his client, were advanced by him and by appellant as considerations compelling further delay of the trial. It is understandable that the Court was disinclined to agree.

Appellant's motion for continuance was noticed for August 20 (R. 136), only five days prior to the trial. *It was at this hearing virtually on the eve of trial that counsel first alleged (either on or off the record) that he had not been retained to defend appellant* (R. 147-148).[21] Mr. Rauh having satisfied the Court

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[20]It will be noted that appellant does not complain that his counsel were given insufficient time to prepare for trial, but only that one of them, Mr. Rauh, was unavailable to him on the trial date itself.

[21]The late appearance of this allegation, on which appellant's brief relies heavily, must have contributed to the Court's view that it was not advanced in good faith, particularly in view of the repeated references by appellant and counsel to "additional

that he could, if he so wished, adjust his personal calendar to the needs of the Court (R. 134, 146), and counsel having again assured the Court that he was prepared to go to trial at the appointed date, the continuance was denied (R. 154).

The following day, August 21, appellant filed a "Notice of Discharge" addressed to the trial judge and stating, without explanation, that appellant had discharged Fong, Miho & Robinson as his attorneys (R. 155). On August 22, appellant's counsel, Mr. Miho, appeared with appellant and asked for leave to withdraw, explaining that appellant had been advised of the consequences of the withdrawal, yet still desired it (R. 157-160).

In response to inquiry by the Court, appellant explained the discharge of counsel as follows:

> "I feel I have put Mr. Miho into an intolerable situation. I don't believe he anticipated he would be required to plead this case at trial. He, of course, is prepared to do it.
>
> "The onus is on me to ask him to retire, which I did. This doesn't represent in any way any dissatisfaction with Mr. Miho's services. They have been quite satisfactory. It is a matter—matter of principle" (R. 161-162).

Appellant further stated that he was not requesting a continuance and that since Mr. Rauh had refused

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counsel," "co-counsel," etc., throughout prior proceedings (R. 43, 45, 86, 90, 95, 97, 98, 103, 104, 113). As appellant obliquely indicates in his brief (at p. 74, footnote 40), it is accepted practice in the Court below for local counsel to appear generally throughout the litigation, even when out-of-state counsel is associated to assist at trial.

to appear on August 25, he was ". . . prepared to go to trial without counsel. I assume that is my penalty for this decision" (R. 162).

Having been thus advised by appellant that appellant's sole reason for the discharge was to relieve Mr. Miho of an obligation he felt Mr. Miho had not knowingly incurred, and having been assured also that appellant was entirely satisfied with Mr. Miho, and having been informed of the part that Mr. Rauh had played in the matter (R. 164), the Court was of the opinion that appellant's discharge of counsel was not motivated by a desire to do without Mr. Miho's services (R. 170-171), and further that appellant's interests would not be served by allowing the withdrawal (R. 171-172).

The Court accordingly denied counsel's request for leave to withdraw and refused to permit appellant to defend in *propria persona,* rendering an oral opinion (R. 167-172) and subsequently filing a Memorandum of Ruling (R. 306-315).[22]

On August 25, appellant appeared with counsel and trial by jury was had. At the outset of the trial counsel again requested leave to withdraw which request was denied (R. 177). Appellant then, having asked and obtained permission to speak for himself, asked for a four-week continuance (R. 178). This having been denied (R. 179), appellant, again speaking for himself, asked for a three-week continuance, which was denied (R. 180). The Government then presented

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[22]This ruling raises another issue, which is discussed below, and which the government believes to be determinative of this appeal.

its case (R. 186-250), and appellant rested without offering evidence (R. 250).[23]

The following morning, August 26, appellant did not appear for the settling of instructions, leaving that matter exclusively to his counsel (R. 253-279).[24] The jury returned a verdict of guilty on August 26, 1958.

On these facts, certain conclusions are inescapable:

(1) Appellant employed Mr. Miho at the outset with the understanding that he would represent appellant throughout the litigation, being joined later by out-of-state co-counsel, if such could be arranged.

(2) Appellant subsequently retained Mr. Rauh to associate as co-counsel with Mr. Miho.

(3) Mr. Rauh attempted to force the Court below to conform its calendar to his convenience, and failing in that attempt he neglected to appear in appellant's trial.[25]

(4) Appellant discharged Mr. Miho and offered to proceed without counsel.

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[23]Appellant alleges in his brief that ". . . the District Judge consistently refused appellant's requests even to address the court." This, of course, is simply not so (R. 178, 180).

[24]This Court may note the fact with interest, since it is inconsistent with appellant's protestations that he did not regard or want Mr. Miho as his counsel.

[25]It will be noted that appellant's brief studiously avoids any discussion of the reasons for Mr. Rauh's failure to appear on the trial date, in spite of the fact that he was in telephonic contact with his client (R. 133) and presumably had ample notice and, by his own affidavit, ample time to prepare (R. 134). Indeed, Mr. Rauh himself, apparently aware of his awkward personal position, made only a half-hearted defense of himself when he argued before the Court below (R. 377-378).

In these circumstances, it cannot be said that there was anything improper in the Court's refusal to delay the trial from August 25, 1958, to a date that better suited Mr. Rauh's personal convenience. This is particularly so in view of the condition of the Court's calendar at the time.[26]

In any event the Court's denial of a continuance was fully justified by the fact that, although the requests for continuance were grounded upon appellant's right to counsel of his own choice coupled with Mr. Rauh's alleged inability to appear as scheduled, it was apparent from Mr. Rauh's own admission that there was no impediment to his appearing to defend appellant on the day set. The denial of a continuance did not therefore deprive appellant of his counsel in any sense.

The Sixth Amendment has never been construed to give defense counsel absolute control of the Court's calendar, but that is precisely what appellant is asking of this Court.

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[26]One should not lose sight of the practical reasons why the matter of granting or denying continuances of trial is solely within the discretion of the Trial Court. Only the Trial Judge is familiar with the state of his calendar, with the demeanor and attitude of parties and counsel, with circumstances involving Court decorum and efficiency, and with other myriad factors which must go into the decision upon request for continuance. At the time defendant was seeking his continuances in this case, Judge McLaughlin was the only Judge present in this District, Judge Wiig having left for an extended period as a visiting Judge on the mainland. Judge McLaughlin's calendar was therefore crowded and not readily adjustable to the convenience of parties and their counsel. The trial date requested by Reynolds was already taken. Thus, it was entirely reasonable for the Judge to deny the continuance, particularly when it was affirmatively shown by the defendant that the continuance was sought only for the *personal convenience* of counsel.

B. Refusal to permit defense in propria persona.

In the opinion of the Government the most serious question presented on this appeal involves the trial Court's refusal, three days in advance of trial, to permit appellant to discharge his attorney of record and to proceed in *propria persona.* Because of the reasons hereinafter stated, and after an extensive review of the cases dealing with the right to represent one's self, it is our opinion that, in the circumstances of this case, it was error to refuse to permit the appellant to represent himself during the trial in the face of his specific and timely request to so act. Whether the right to represent one's self is a constitutional right conferred by the Sixth Amendment (see *Adams v. United States, ex rel. McCann,* 317 U.S. 269), or a statutory right conferred by 28 U.S.C. 1654 (see *Brown v. United States,* C.A. D.C. No. 14389, decided February 5, 1959), it is nonetheless a right of which a defendant may avail himself, provided that he makes his decision intelligently and with eyes open and provided also that the request is not made for the purpose of obstructing or delaying the trial. *Johnson v. Zerbst,* 304 U.S. 458; *Adams v. U.S., ex rel. McCann, supra. Wharton's Criminal Law and Procedure* states:

> It is universally held that a defendant in a criminal case who is *sui juris* and mentally competent may conduct his defense in person without the assistance of counsel. (Volume V, p. 2016, 1957 Ed.)

Although the cases cited in *Wharton* in support of this principle are State cases, the rule seems equally

well settled in the Federal Courts. See for example, *United States v. Mitchell,* 138 F. 2d 831 (C.A. 2), cert. den. 321 U.S. 794; *United States v. Foster,* 9 FRD 367 (S.D. N.Y.), convictions affirmed *sub nom. Dennis v. United States,* 341 U.S. 494; *Overholser v. De Marcos,* 149 F. 2d 23 (C.A. D.C.), cert. den. 325 U.S. 889; *United States v. Gutterman,* 147 F. 2d 540 (C.A. 2); *Duke v. United States,* 255 F. 2d 721 (C.A. 9), cert. den. 357 U.S. 920; *United States v. Cantor,* 217 F. 2d 536 (C.A. 2). It is, of course, the duty of the trial Court, in insuring that an accused receives a fair trial, to satisfy himself that a waiver of the constitutional right of assistance of counsel is made intelligently, understandingly, and in a competent manner. "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst, supra,* at 464, 465. In the circumstances of this case, where the defendant was a college professor, where he had indicated through his efforts in advance of trial a desire to secure specialized counsel in addition to Mr. Miho, where he made a specific and unequivocal request of the Court three days in advance of trial to conduct his own defense since the specialized counsel he sought would not be in Honolulu in time for the trial, and where there is no indication that the request to represent himself was for the purpose of securing a delay in the proceedings or to permit the use of the obstructionist tactics at the trial,

it is our opinion that the defendant should have been permitted to represent himself at the trial.

CONCLUSION.

For the reasons set forth under Point V B of this brief concerning the trial Court's denial of appellant's request to proceed at the trial in *propria persona,* the Government, on that ground, does not oppose the appellant's request of this Court for reversal of his conviction. As to the other contentions advanced in appellant's brief, it is respectfully submitted they are without merit and the rulings of the trial Court thereon were proper.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

EXCERPTS FROM TRUSTEESHIP AGREEMENT
61 Stat. 3301-2, 3304

Agreement approved by the Security Council of the United Nations April 2, 1947, respecting trusteeship for the former Japanese mandated islands. Approved by the President of the United States of America July 18, 1947, pursuant to authority granted by a joint resolution of the Congress of the United States of America July 18, 1947; entered into force July 18, 1947.

Trusteeship Agreement for the Former Japanese Mandated Islands

Approved at the One Hundred and Twenty-fourth Meeting of the Security Council

* * * * *

Article 1

The Territory of the Pacific Islands, consisting of the islands formerly held by Japan under mandate in accordance with Article 22 of the Covenant of the League of Nations, is hereby designated as a strategic area and placed under the trusteeship system established in the Charter of the United Nations. The Territory of the Pacific Islands is hereinafter referred to as the trust territory.

Article 2

The United States of America is designated as the administering authority of the trust territory.

Article 3

The administering authority shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.

* * * * *

Article 5

In discharging its obligations under Article 76 (a) and Article 84, of the Charter, the administering authority shall ensure that the trust territory shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end the administering authority shall be entitled:

1. to establish naval, military and air bases and to erect fortifications in the trust territory;
2. to station and employ armed forces in the territory; and
3. to make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for the local defense and the maintenance of law and order within the trust territory.

* * * * *

Article 13

The provisions of Articles 87 and 88 of the Charter shall be applicable to the trust territory, provided that the administering authority may determine the extent of their applicability to any areas which may from time to time be specified by it as closed for security reasons.

EXCERPTS FROM CHARTER OF THE UNITED NATIONS
59 Stat. 1048-50

Chapter XII

International Trusteeship System

Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

* * * * *

Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a. territories now held under mandate;

b. territories which may be detached from enemy states as a result of the Second World War; and

c. territories voluntarily placed under the system by states responsible for their administration.

* * * * *

Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

EXTRACT FROM THE OFFICIAL RECORDS OF THE SECURITY COUNCIL OF THE UNITED NATIONS, 124TH MEETING, 2 APRIL 1947, PAGES 668-9

The President: There is a United Kingdom proposal to re-draft article 13. It has been circulated.

Sir Alexander Cadogan (United Kingdom): I do not think I need say very much about the amendment which stands in the name of my delegation. The text has already been circulated.

In the view of my Government, article 13 is one of the most important articles of the United States draft. My Government realizes that it would be impossible to provide for any prior notification to the Security Council of any areas which may be closed for security reasons, but it hopes that some provision will be inserted for notifying the Security Council when areas are closed, giving reasons if possible. With that object, we have submitted, for the appreciation of the United States delegation, this re-draft which you will find in the paper circulated.

Mr. Austin (United States of America): Perhaps the United Kingdom representative would be entirely satisfied if the records showed that the United States contemplates that notification should be made to the Security Council whenever the proviso that is contained in article 13 comes into effect. Article 13 seems to the United States of such great importance that it could not accede to a suggested change, and the United States is very anxious to find out whether my statement, as representative of the United States, is satisfactory thus avoiding a prolonged discussion. If that

is the case, I will not go into a full discussion of the matter.

You will notice that the act of specification is an act of notification, and it is the purpose of the United States to keep the Security Council notified. Of course, the main element of the provision is to bring into operation Articles 87 and 88, which call for inspection, examination and reports. Obviously the proviso is a necessary one in the interest of security; otherwise it would not be there.

Sir Alexander Cadogan (United Kingdom): I am much indebted to the representative of the United States for the declaration which he has just made. The chief purpose of the amended text which I submitted was to ensure that the Security Council should be notified in these cases. The United States representative has said that the word "specified" in his article 13 implied an act of notification, and he further declared that his Government contemplated keeping the Security Council notified. That seems to me entirely satisfactory, and I am very grateful to the representative of the United States for the declaration which he has made.

The President: In view of the satisfaction that the United Kingdom representative has expressed at the declaration of the United States representative, I take it that no vote is required on the United Kingdom proposal in regard to article 13.

Articles 13 and 14 were unanimously adopted.